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PROBLEMS OF THE LAW'S EVOLUTION.*

IN THESE lectures I shall attempt to describe some of the problems that abound in today's legal science. Solutions I shall not hesitate to offer, if I see any. But my principal object is to call attention to the presence of the problems, and to urge you to devote your energies to discover their right solutions.

In a trinity of lectures, it is natural to select that triune division of any field,—the Past, the Present, and the Future: In the first lecture will be sketched some of the problems of the Past,—in particular, of the Evolution of Law; in the second, some problems of the Present,—in particular, of Methods of Making Law; and in the third, some problems of the Future,—in particular, of America's Share in World-Legislation. The first kind of problems would be of prime interest to the Scholar; the second, to the Practitioner; and the third, to the Citizen and the Statesman.

But, before any discussion of law, must come its definition. What is law? The venerable Hooker, at one extreme of thought, assures us that "the seat of law is the bosom of God,

*EDITORIAL NOTE: This is the first of a series of three lectures delivered at the University of Virginia by Dean Wigmore, on the Barbour-Page Foundation. The subject of the series was "Problems of Law, its Past, Present and Future." The title of the lecture printed above was "The Past: Problems of the Law's Evolution." The title of the second lecture was "The Present: Problems of the Law's Mechanism in America." The title of the third lecture was "The Future: Problems of the Law's Adjustment between Nations." These lectures will be published in book form by the Barbour-Page Foundation.

her voice the harmony of the world. All things in heaven and earth do her homage, the very least as feeling her care, and the greatest are not exempted from her power; both angels and men and creatures of what condition soever, admiring her as the mother of their peace and joy." This nebulous idea of law is far above the level of my thought. At the other extreme is Farmer Corntossel's definition, who mused thus: "Law," he announced, "is like a colt; you can never tell what it's really worth until you've broken it!" Yet this mundane pragmatism hardly suffices. Steering between these two, I shall proceed, with compass and microscope, to make a dry analysis of law as a scientist might see it.

The term law may be applied in geology, in philology, or in human conduct; the last is our field. In human conduct, law is used either of behavior of a group of humans in general, or of behavior of a group living under a political power; the latter is our part of the field. Law here implies four separate elements: (A) *Human conduct* is affected by it; (B) The *mode* of its affection is (a) By a *uniform* or regular quality of behavior, as contrasted with a variable or arbitrary sequence of acts; (b) By a *compulsion,* objective or subjective or both, as contrasted with a purely voluntary behavior; (c) By a *state power* giving the force in this compulsion, as contrasted with unorganized social opinion supplying the compulsion. Let us look again a moment at these last three elements; so as to ensure a common understanding about the problem: B (a) The element of *uniformity* or *regularity* in any human situation, as where A kills B. A score or a hundred facts can always be found in each situation; e. g., A may wear a white hat, B may be rich, A may be a farmer, and so on. Uniformity means that one or more of these facts are selected as the essence; so that whenever those selected facts exist, a specific result follows; e. g., in the Anglo-Saxon law of Ethelbert, whenever a man kills a thane of the third class the killer always pays forty shillings. This is contrasted with irregularity or arbitrariness, as in a modern jury's verdict, where the basis for each verdict varies arbitrarily and indefinitely, both as to the amount and the circumstances that lead to the fixing of that amount (being limited

only by the statutory maximum of $5000 or $10,000). Now, this contrast between uniformity and non-uniformity is due, as above noted, to the selection of the same few facts as the essential ones, leaving the others ignored. This is therefore the perpetual and inherent contrast between law and justice,—between the rigid uniformity of an American statute and the capricious orders of an Arabian Sheik. And whether we are discussing the practical needs of today or the evolution of the past, this is always the contrast of forces that faces us—the contrast between law and justice.

B (b) *The element of coercion or obstrictiveness.* The contrast here is between voluntary and obstricted (or coerced) conduct. The coercion need not be actual (objective), but may be merely potential (subjective) by fear of the possible force; as, when the faithful canine, Towser, susceptible to the sight of a feline enemy, is tempted to pursue, but upon his owner's stern voice and a shake of the stick, Towser turns humbly back and crushes his impulse. But this contrast of voluntariness and coercion, how does it arise? It arises because in a multitude of persons the variety of individual temperaments, desires and perceptions is great, particularly the variety of will-force; hence the uniformity of conduct, if not preserved by compulsion, would constantly be broken by individual strong wills. Whenever a common force, on behalf of uniformity of behavior, suppresses or is ready to suppress the individual force, we have the second element of law. For example, on the floor of the New York Stock Exchange, the daring wearer of a straw hat on a warm day after October first would find it dashed from his head by a physical force representing common opinion.

B (c) The element of *State power, or politicality.* It does not here matter what kind of State it is, nor what kind of a ruler—king, chief, oligarchy, or ochlocracy. Nor does it matter what kind of force or coercion (the second element) is used. A State may compel by boycott or other force of excommunication, as well as by a red-axed executioner or a military firing-squad. The contrast is between the casual force of an unorganized community, and the systematic force of an organized

community. For example, in a church on Sunday morning, the man does not exist (in our circles) who would, during the minister's prayer, call aloud cheerily to a neighbor in the congregation, "Neighbor Jones, did you lose that foursome on the links yesterday?" Here there is absolute subjective obstriction to uniform behavior by mere deference of the individual to communal opinion in the congregation. But among peoples where religious fervor and factionalism is often strong—as with the Scotch, the Poles, the Africans—the State police have sometimes been called in to suppress obstreperous individuals who are not susceptible to anything less. And in medieval times, the Church, which was then really politically organized, used the force of excommunication (not a physical one) as an effective coercion.

We have now defined these three elements under B, the second head; this may be termed the *formal* element in law. The first head, A, may be termed the *substantial* element (using these terms in the old philosophical sense). Let us now return to the first head, to define it more carefully.

A. The *substantial* element, *i. e., human conduct-relations.*

Is it not enough to point out generally that these are infinite? Survey in the mind all possible occupations, all the daily life of every man, woman, and child in this country and every other country, and in this day and week and month and season and every preceding and following age, and we shall perceive the endless variety of this substance or material to which law applies, i. e., applies its uniform rules obstricted by State force.

Now the obvious feature here is that this substance is something common to law and to social habits generally. That is, life in society supplies these materials independently of law; law merely applies its formal elements to some or all of them. People would go on digging, planting, harvesting, hunting, marrying, selling, and consuming, even if there were no law. Social opinion or convention would sanction and secure certain habits of conduct, even if no law did so. We can and must study the existence, for example, of marriage and inheritance and sale customs in many primitive communities where no law touches them; and even in modern communities

the several social institutions exist more or less outside of and free from law.

In short, law does not create these varieties of conduct, and they are not any part of the formal element of law. Law merely applies its formal element to them.

Law does indeed select certain factors in each conduct-relation, and give or refuse recognition to them; but it does not create them. For example, if a lecturer were to be moved to say falsely on this platform that the action of Governor Jones in calling out troops to quell a riot among miners in Illinois was a gross invasion of civic rights, the law might have declared this utterance to be a criminal or a civil libel, and in deference to that law, the lecturer might refrain fom the utterance; and to that extent law would have changed the actual course of conduct. Nevertheless, the riot, and the troops, and the Governor, and the lecturer's desire to make that utterance, these all exist by social forces independent of law; then (in theory at least) we contemplate the lecturer as actually uttering what he desires, and then declare the law to forbid that act; so that *all* the materials of conduct to which law applies are given independently of formal element of law.

The lesson here to be drawn is that the study of the *substantial* element of law begins always with social facts and institutions. And the problem always is: To which factors in social relations does law choose to apply its rule and sanction? This is alike true whether we are studying Law in its past evolution or Law in its present legislative needs. Take for example the contract of marriage in the making. For the evolution of past law in a given country, we must first observe the social facts of human mating, and the legal problem then is: When and in what form did law, as distinguished from mere custom, come to take the subject in hand, and how far did its rule coincide with or vary from any particular trend of custom? And for modern legislation, a question is: Observing the social facts of marriage between persons who go from a strict State to a loose State to mate with each other, how far ought and can law interfere by some State rule to control that social fact?

All this discrimination is necessary because unless we realize

that law is in its substance not a separate thing from social life, and unless we concede this partial or complete overlapping of social habit-facts by the rules of law, we can never expect either to trace correctly the evolution of legal rules or to devise the proper dictates of legislation.

We are now, after these tedious definitions, in a position to analyze some of the

I. PROBLEMS OF THE EVOLUTION OF LAW.

1. A first thing to notice is once more this distinction between the *substantial* and the *formal* elements in law.

ELEMENTS OF THE IDEA OF LAW.

A. *Substantial Element=Human Conduct-Relations.*

Family-Relations
- Parental
- Marital
- Etc.

Property-Relations
- Ownership
- Lease
- Etc.

Liability-Relations
- Torts
- Contracts
- Etc.

B. *Formal Element=Mode of Affecting Conduct.*

Includes
- (a) *Uniformity or Regularity* (as contrasted with Variable or Arbitrary Sequence)
- (b) *Coercion* (as contrasted with Voluntary Action)
- (c) *State Power* (as contrasted with Social Opinion)

In the *substantial* elements we are dealing primarily with the facts of social habit. Strictly speaking, there is here no evolution of law as such. There is evolution of social habits and institutions; and at some time or other Law may or may not have

been applied to a given habit or institution. Take, for example, the use of the wedding ring at the marriage ceremony. This usage takes us back to prehistoric or to mythologic times in many lands; as a fact of social custom, it is marked and inveterate, and yet law, so far as I am aware, has never had anything to say about it. Law has had something to say, in middle and later epochs, about various other factors in the marriage contract-making—age, place, status, consent, officials. So that the problem of Evolution of Law here is, When and how has Law selected certain factors and imposed a rule for them? Now, to solve this problem, we must first collate and study the entire data of social facts; and yet, in the course of doing this, we are fairly certain to have collected the data for the subsidiary question how the *legal* rule developed. It is only in the more advanced stages of law that we can separate sharply the body of legal rules from the social habits, e. g., in our own statute book today; but even then we cannot hope to understand their evolution apart from the social facts. The lesson here, then, is that the evolution of the substantive part of Law is virtually inseparable from the evolution of social habits. And that is why any accurate knowledge of that part of legal evolution will be a long time in coming.

2. A second truth to be kept in mind is that evolution in Law, as in other cosmic facts, is always the result of a *conflict of forces*. The situation is very much like that of two men pushing face to face on the pavement, each seeking to pass, or wrestling in a final grip on the mat; in the wrestling match, finally a slight balance of force prevails, and the one man falls on his back, with the other over him as the winner. Then there is equilibrium for a while, but only until the next bout begins. Law is usually a series of wrestling bouts; the prize to the final winner signifies the enactment of the winning force as a rule of law. Complete rest may or may not ensue. But the victory does not signify the annihilation of the losing force; it signifies only a slight overbalance in the winning force, followed by a more or less permanent rest, according to the conventions of the game. For example, the recent victory in this State, under the leadership of a distinguished Virginia gentleman whom I am proud to claim as a friend and colleague, of the system of registration of land

titles over the old system of recorded deeds, signified a long wrestle between the forces of general business convenience of land owners against the forces of mere inertia of habit and of positive self-interest of the private title insurance companies.

The importance of this truth is that to solve the problem of evolution of a legal rule, we must first analyze fully the respective social forces which were struggling underneath the surface before the rule of law came into being; for the decision or enactment of a rule of law meant simply the over-balance of some forces against other forces.

In physics, Sir Isaac Newton's third law of motion was this: "To every force there always exists a corresponding force which is equal and oppositely directed." When the forces which aid any uniform motion are added to those which oppose the motion, the sum is always zero. And even when motion is not uniform, and acceleration exists, there a force of reaction will be found; for Newton's Law proclaims that action is always equal and opposite to reaction. The same truth obtains in the mental and social world.

3. A third postulate to keep in mind is that evolution is something less than mere history and something *more than an abstract formula.*

What is meant by the evolution of law? Does it mean necessarily progress? Or may it mean mere change? And if so, change of what? Can we conceive of a going backward, in evolution,—or of the death of an institution? May there be a degeneracy now and then, in evolution?

The usual discussions of legal evolution seem here to commit certain fallacies. For example, in Sir Henry Maine's masterpiece, "Ancient Law," perennial in its freshness and stimulus, the learned author, in describing the development of contract, sums up the change as a change from general concepts to special ones. Again, in the same field, he declares that the contract began with ignoring the moral idea of keeping faith but looked solely at some outward ceremony, and ended by minimizing the outward form and protecting the mere mental and moral promise, the actual will of the parties; in short, the movement is from outward physical form to inward moral essence, or, as he puts

it, "from a gross to a refined conception." Again, in another famous generalization, he offers the thesis that the movement of human relations in general is "from Status to Contract." So, too, De la Grasserie has discovered, he thinks, some twenty-eight general trends in the evolution of law, enumerated as follows:

DE LA GRASSERIE'S TWENTY-EIGHT DISTINCT EVOLUTIONARY MOVEMENTS OF LAW.

1 From Custom to Ordained Law and to Judge-Declared Law;
2 From Oral to Written and to Codified Law;
3 From a Law of Nature to a Positive Law and a Law of Equity;
4 From Local to General Law;
5 From Simple to Complex Law;
6 From Material to Immaterial Law;
7 From Formal to Formless Law;
8 From Theocratic to Secular Law;
9 From Criminal to Civil Law;
10 From Civil to Commercial and Industrial Law;
11 From Political to Private Law;
12 From Collective to Individualistic Law;
13 From Esoteric to Popularized Law;
14 From the Outward Act to the Mental Act as Creative of a Right;
15 From Rights *"in rem"* or Real Rights to Rights *"in personam,"* or Obligatory Rights;
16 From a Law of Nominate Relations to a Law of Innominate Relations;
17 From Concrete to Abstract Rights;
18 From Immediate to Deferred Rights;
19 From Gratuitous to Commutative and Aleatory Transactions;
20 From Legal Regulation to Liberty of Contract;
21 From Unilateral to Bilateral Agreements;
22 From Family to Individual Rights;
23 From Ethnic to Territorial Law;
24 From Exclusion to Admission of Foreigners;

25 From a Law of Violent Methods to a Law of Peaceful Methods and of Equitable Aims;
26 From Oral to Written Form and the Return to Oral Form;
27 From Immovable to Movable Property;
28 From Reality to Fiction.

Now these and other generalizations naturally suggest two or three critical questions, before we can accept them as solutions *pro tanto* of the problems:

(a) What *definiteness* of *meaning* do these scholars give to the evolution of a legal idea? Let us answer this by saying that it means something less concrete than history, and something more lifelike than a mathematical formula. For example, the *history* of human marriage would fill several volumes; but its *evolution* is something that could be summed up (one would suppose) in a page or two. On the other hand, to say (for example) that the evolution of marriage, in respect to the number of persons that mate, passes from promiscuity through polygamy to monogamy (assuming that this were true) is too abstract, in that it ignores the contrary local variations and does not explain them, and therefore fails to represent the whole truth. The reason is that it fails to state anything about the outside factors which cause the movement; for example, local poverty of economic resources may make polygamy impossible, or local moral precepts may make monogamy impossible; and thus the abstract formula becomes fallacious.

We may therefore, simply to have a common understanding of terms, take the following definition:

The evolution of law, which we seek to discover, does not imply progress, either morally or otherwise, but merely movement; it does imply movement in the *abstract elements* of the conduct shown in history, seeking always to proceed to the more and more abstract; but always including *the cause with the effect.* In other words, we seek to trace the movement of the more abstract elements in the history of each type of legal conduct, so far as the sequence of cause and effect can be discovered.

(b) The second critical question is: Do these scholars assume

constancy in the evolution of a specific legal institution, in all epochs and all communities? They do often seem to assume this. They assume it very much as all of us (including scientists) assume constancy in the nature of the fundamental chemical elements, such an sodium, magnesium, or nitrogen; that is, wherever an atom of nitrogen exists in the cosmos, it is always the same in its nature, and will always work in a certain way. Many years ago, I published an essay on the development of the mortgage or pledge idea, in all available systems of law, Germanic, Greek, Jewish, Babylonian, Egyptian, Japanese, Slavic, and Roman; and I formed the impression in my own mind (though I publicly disclaimed insisting upon it) that the pledge idea had somewhere an inherent sameness or constancy, which would therefore develop alike, in general features, in all communities and in all epochs. And we find it often assumed by scholars that in the world of legal ideas there are certain atomic elements (so to speak) which, if they develop at all, will develop spontaneously in a necessary or constant way, no matter what may be the combinations with others—for instance, the movement from judge-made law to legislative statute, from formal procedure to informal procedure, from unwritten law to written law, from paternal family power to individual independence.

Now it is of course obvious, upon reflection, that no such inherent fixed tendencies in legal ideas have been proved to exist. Probably no scholar today would deliberately affirm it, except a few of the idealists. But we need to avoid the danger of its assumption in tracing the positive evolution of law. What really takes place, in evolution, is a change of effect whenever there is a change of cause; and these causes come chiefly from outside the law itself. For example, until the invention of writing, legal customs could not be written down, on stone or parchment; the Scandinavian law-men, for instance, committed the customs to memory and chanted them, up to about 900 A. D. All the development of legislation and justice that ensued from such epoch-making incidents as the inscription of the Twelve Tables at Rome, or the compilation of the Germanic Codes in the fifth and sixth centuries A. D., became possible only by the use of writing. If writing had not come into use, we cannot say just

what would have been the course of development. In modern African tribes, for instance, justice is still done without written law; and an important cause of its difference from European law must be the lack of writing, and not necessarily some inherent nature of legal ideas. Had there been some intrinsic nature, it would have developed, irrespective of writing.

Another circumstance that must make us skeptical as to any inherent constancy of evolution for legal ideas is the extraordinary *differences of speed* of evolution of humanity in different epochs. Apparently, the speed has increased enormously with the lapse of time. The paleontologists tell us, for example, that during the Third Interglacial Period of the world and the Fourth Glacial Period (the Lower Paleolithic), represented by the Piltdown and the Neanderthal races, the time that elapsed was 125,000 years; yet the entire human progress in arts of life made in that inconceivably long period is represented only by improved methods of chipping the surface of flints for the making of tools.[1] In short, the evolutionary changes in family and property institutions, during the last 3,000 years, have been vastly more numerous and rapid than in the whole preceding 400,000 or 500,000 years of the life of the human race. This being so, there is little room for assuming any inherent constancy in the operation of a particular legal idea.

In short, the only constancy, if any is discovered, in evolution of law, is constancy of cause and effect, not of inherent nature of a legal idea.

(c) The third critical question is this: Do these scholars assume *universality* of a formula of evolution throughout all legal *ideas?*

Let us roughly enumerate the entire mass of principal legal ideas: Personal relations, including family and clan, marriage, parentage, adoption, emancipation, expulsion, etc.; Property, including ownership, lease, mortgage, succession, community, sale, etc.; Liability, including tort, crime, contract, agency, suretyship, etc.; Procedure, including judge, summons, arrest, pleading, evidence, judgment, etc. Now, let us take some of De la Grasserie's

[1] H. F. OSBORNE, MEN OF THE OLD STONE AGE, (1916), pp. 15-23.

twenty-eight generalizations as to the movement of legal evolution. These generalizations represent, as it were, identical threads of evolution on which *all* legal institutions are strung. But does this learned investigator mean that these threads are the same and equally true, not only in the main trunk ideas of the law, such as family and property, but also in each branch idea, such as marriage, adoption, succession, partnership, etc.? For example, the assertion that evolution proceeds from the simple to the complex. Is this alike true for family and clan law as a whole and for every detailed idea of it, such as relationship, marriage, divorce, and adoption? It is certainly not true for relationships, nor for marriage, nor for adoption; it may be true for divorce. Is it alike true not only for liability as a whole, but also for the specific forms of liability such as suretyship, money debt, tort, warranty of property, etc.? If it is true for liability in general, it is hardly true for money debt, for warranty, or for suretyship. And if it is not thus universally true, *where and why does it cease to be true?* And if it ceases to be true in any species of any genus of legal idea, what becomes of its validity as a general or abstract truth? Moreover, since these general truths obviously differ, in that some purport to apply in the whole field and some in part only (such as property), *why* are some of them universal and some only partial?

I do not offer any solution here. And I realize that perhaps one or several of these abstract truths can be demonstrated empirically or by observation to be universally true. But I merely raise the warning that we cannot assume beforehand that such universality of truth exists and will be discovered in the evolution of legal ideas. All we can assume is the universality of identical effects from identical causes.

We are now in a position, with these criticisms in mind, to consider two interesting problems of legal evolution:

I. What are possibly the most general formulas of evolution?

II. What is the necessary method of study to be used in tracing evolution?

1. *What are possibly the most general formulas of evolution?*

This inquiry has fascinated the philosophers for centuries. I

confess to a skepticism of their hypotheses. I will try to demonstrate their unsoundness, and the greater probability of a rival hypothesis.

We must of course assist our minds by analogies in the material world. The philosophers have resorted to the analogies of physics and physical forces. Some philosophers, for example, have imagined the path of progress to be in a simple undulating line; others figure it as a single line with angular regressions. Vico conceived it as a simple circle returning upon itself. The popular notion is that of an ascending straight line. De Greef supposes a helix, or circular spiral, constantly ascending, but returning over itself identically; De la Grasserie accepts this figure. Goethe pictured a helix, or circular spiral, constantly ascending but enlarging itself. Goethe's symbol, says Picard, a recent writer, in his chapter on evolution of law, "seems, better than any other, to take account of the immense variation of facts, especially in the law, while marking the destined tendencies."

But, to me, that is precisely what it seems *not* to account for, viz., the immense variety and variation of forces. For, as already pointed out, the evolution of legal ideas is affected by a large number of forces, great and small, acting oppositely or in harmony, some here and some there, in the different parts of law, in different countries, and at different times. Hence, it is simply impossible to assume that the total path of evolution is so simple as even Goethe's spiral. Take for example, the types of human mating—promiscuity, polygamy (in its two forms of polyandry and polygyny) and monogamy. Now the movements to be represented in our symbol must include *all* communities in *all* epochs of time, and must represent all of these three forms. According to Goethe's spiral, the movement could only be from one of these forms through another into the third, either once in all time, or else over again at each coil of the spiral; and it must be the same movement in all communities past, present or future. And yet we know that a few communities have been arrested in their growth and still practice polygamy; and we have no proof that no community has circled through all three and started again on promiscuity; moreover, we do not positively know that some communities did not begin with monog-

amy. And in other parts of law the simplicity of Goethe's spiral is even more incongruous with observed facts.

A much more plausible hypothesis, to my mind, is the analogy of the planetary system, with its numerous local interdependent motions. To apprehend its application to the movements of legal forces, let us call to mind the principles of physics, as illustrated in the ordinary gyroscope.

As you know, a rigid body in space of three dimensions has three degrees of independence of motion; that is, three axes on which its rotation will have no component of motion about either of the other axes. Thus, the gyrostat has three possible directions of rotation about either axis O A or axis O B or axis O C, each at right angles to the other two. Every such rotation will be due to some external force, and each such external force will somehow affect the resultant motion dependently upon the other forces. For example, by the pull of gravity the body may be forced to rotate about axis O A. Or by a separate push or torque, it may be made to rotate around the axis O B. Or, still a different force might give a third motion or precession about the axis O C. Now the speed and fluctuations of this new motion will depend on the relative measure of the three or more forces. These forces, being external and independent, may vary infinitely from time to time; but the result of their operation in each instance will proceed according to certain discovered formulas.

To illustrate concretely, I hold here, in my left hand, a bicycle wheel, free to rotate on its axle. Let the axis of my right arm, when stretched out to my right, be axis O A; let the axis of my left arm, stretched out directly in front of me, and holding the axle of the wheel prolonging my left arm, be axis O B; and let my body, upright from the floor, be axis O C. Now (1) with the wheel thus extended, the force of gravity is pulling it downwards, with a rotation around axis O A; call this force X; but the pull of my left hand counteracts the force momentarily and holds it up; call this X'; if the pull or lift of the left hand, X', is removed, the wheel falls by gravity, X, i. e., rotates around axis O A. (2) Again, another external force applied to the wheel at the rim will produce rotation left-right around the left

arm, axis O B; call this force Y; and an opposite force would cause its rotation right-left around the same axis, clock-wise to the spectator; call this Y'. (3) Again, a third force, applied to the wheel, would cause its rotation east-west around the upright axis of the holder's body, O C; while an opposite force would cause a corresponding rotation west-east around the same axis; call these Z and Z'. And the simultaneous application of either of these latter two opposite forces, Y and Y', or Z and Z', would leave the wheel stationary, as in the case of X and X'. Now one of the discovered laws of such forces is this: If, while gravity alone, the force X, is operating on the wheel (thus held out on the left arm) to rotate it downwards around axis O A, another force, Y, is applied to rotate it left-right (against the clock) around the left-arm axis O B, the entire wheel takes on also a rotation east-west around the upright axis O C (the body of the holder). And the more rapid the rotation around O B, the slower the rotation around O C. And if the point of support be shifted, by transferring the hand from one side to the other of the wheel, so that the direction of the O A rotation (due to the pull of gravity, force X) is reversed, then also the direction of the rotation around axis O C is reversed from east-west to west-east; and yet the *rotation of the wheel around O B continues exactly as before.*

If, then, we ask, What is the path of motion of a given particle of matter, M, in the wheel, when acted upon by force Y? that path superficially *seems* to be always a simple circle, going around axis O B as a center. But if we add thereto the facts that force X, or gravity, is acting to pull the particle around axis O A, and that no force X', or uplift, is counteracting gravity, and that no force of friction or other obstacle is preventing motion around axis O C, we find that in fact the true path of the given particle, M, is not that simple circle, but is a complex curve, determinable by a mathematical formula which takes into account all the above forces and their quantities. And if we add to our reckoning the periodical shifting of the center of gravity, from one side of the wheel to the other (due to shifting the location of the hand) we find that the path of the particle M becomes still more complex,

while remaining symmetrical and regular, so long as none of the forces are altered.

What, then, is the lesson of this analogy for legal evolution? If a spoke of this wheel represents an institution, let us say descent of property after death to lineals instead of to collateral relatives, our superficial observation, finding it in its first position, is that the institution is stationary; and further, that when a force, Y (let us say migration of races), is applied, its motion becomes circular, against the clock, around O B. But we must notice further that in both cases we have omitted to reckon that gravity (let us say religion in this case), force X, is operating to pull the institution around O A, but is counteracted by the upward lift of the hand, force X′ (let us say the political power of kings); and that as soon as force X′ is removed, the motion of the spoke is now in reality a complex one, due to recession east-west around axis O C; and that the further change of the centre of gravity (let us say the economic change from a tropical country to an arid or cold country) produces another change of motion in the institution. Now, these several forces are all external to the institution itself; and they may themselves all be subject to regular and periodic operation, and not to arbitrary or whimsical happening, such as is due the momentary choice of the lecturer. Moreover, these forces vary widely in different times and places.

So that, if we ask again, What is the evolution of a given legal institution? we now perceive that, even with these simple elements exemplified in a wheel held by the lecturer, the path can never be a simple circle, or any elementary curve, but must be at least a complex of many curves, original and different for each institution.

Moreover, while all this is going on, with only these few elements assumed as representing the whole, there is besides a larger body, to which the first and smaller one is affixed (like the building in which the lecturer is), and the larger body may also be moving independently, and moving in any one of the three primary directions, and subject to still other forces. And furthermore, this larger body may itself again be part of a still larger

system, one of several bodies, and the larger system will have its own motions under its own forces. In the total cosmos of bodies, the motions of the smaller bodies will be affected by the motions of each of the larger systems, though the larger ones may not be appreciably affected by the smaller ones. And the motions of one or more of the smaller bodies may reverse or cease while all others continue. In short, we shall have a planetary system, full of endless possibilities.

The analogy of this planetary system to the law will not be necessarily identical; no physical analogy would be. But at least it shows how such complexities are consistent with regular evolution, i. e., with constancy of change and relation of forces by cause and effect, in a set of legal ideas forming part of a whole system. And the complexities of inter-related legal movements are certainly no less than those of the planetary system, but presumably vastly greater; for human life is but a part of the terrestrial mass, and law is but part of human life, and the details of their forces and phenomena are obviously more numerous than the grand forces of the total mass.

Take, for an example, the evolution of the last will or testament. Sir Henry Maine and others have attempted to disentangle the various elements of its growth in the law of Rome, Greece, Germania, and India. What is certain is that in a primitive stage there is no will, and that at a later stage the will is recognized. But on analyzing this net line of motion, so to speak, we find that it is the direct resultant of at least several forces; and that all of these are affected by still other forces proceeding from still larger independent legal institutions. In the first place, the force tending to validate the paternal last will is directly modified by several minor forces; there are the claims of the blood relatives, of the wife, and of children; and furthermore the distinction between agnate (male line) and cognate relatives, and between male and female descendants, between polygamy and monogamy, will here produce minor variations according to time and place. Then, outside these, are the larger forces represented by the system of religion, of economics, and of property. Religion requires that the family worship, the ancestral rites, shall be continued; "religion prescribes" said Cicero,

"that the property and the worship of a family shall be inseparable." "He who inherits" said the Hindu Laws of Manu, "is bound to make offerings upon the tomb." And so the Hindu's only expedient, and a common one in all peoples, for transmitting the estate where no blood-child existed, was the expedient of artificial adoption; thus the limitations of the principle of adoption affected the paths of evolution of the testament. This principle of adoption is itself part of another sphere of forces involving artificial relationship; of which the variety known as blood fraternity has now died out. But, furthermore, the economic system sometimes distinguished between land or house and the few primitive movables; for example, in some of our own surviving American Indian tribes, a man's movable property is all that he owns personally, and it is destroyed at his death; it cannot be inherited, and therefore it cannot be willed; moreover, the communal property, or land, continues, just as before, to be owned by the community; the individual has nothing to will. And so we find a subordinate eddy in the limitations upon testament, viz., that certain properties cannot be included; then at a later stage, they may be included by consent of relatives; and finally without such consent. Still, further, the mode of transfer of property affected the movement of the evolution of the will; for in Rome the patrician will, recorded before the Comitia Curiata, was a variety of adoption but disappeared gradually, while the plebeian will, which proved the permanent form, was made by a formal sale or mancipatio. And finally, in Germanic law, both continental and English, the whole movement of testamentary evolution receives new turns by the local ideas of transfer, including the *salman,* the feoffee to uses, and the executor; while the Roman example, arriving in different countries of Western Europe during different centuries, introduced a new force, that of imitation, which added still other variations. This imitation of the Roman law, in European history since 600 A. D., is like the addition of the magnetism or gravitation of a great central sun, added outside the system, which exerts a modifying force on every legal institution native to each of the smaller spheres.

My summary is, then, that no simple spiral will serve as an analogy; that no less complex an analogy than the planetary sys-

tem will serve; that this analogy is a useful guide in our studies, because the gyroscopic inter-action of planetary forces reveals to us the inevitableness of similar inter-actions in the forces affecting laws; and that therefore we cannot expect to trace the evolution of a single legal institution without conceiving of it as a body in a motion produced by a force, this motion modified by other immediate forces, and this body and its motions being one part only of a larger body which is itself in one or more motions produced by other forces and modifying the first motions; and this system as one part only of a larger system of forces and motions; and so on, indefinitely.

II. Another interesting problem is: *What is the necessary method to be used in tracing the evolution of a legal idea?* Hitherto, little if any, of the results achieved in the evolution of law have been reached by a rigidly scientific method. The reasons that extenuate and account for this are numerous.[2] The

[2] The general objective of a science of universal legal history has indeed been perceived to require something more than the collection and collation of data of numerous peoples; notably this has been insisted on by Post, in his ETHNOLOGISCHE JURISPRUDENZ and other works, and by Del Vecchio in his SCIENZA DEL DIRITTO UNIVERSALE COMPARATO (both translated, in part, in Kocourek and Wigmore's PRIMITIVE AND ANCIENT LEGAL INSTITUTIONS, 1915, EVOLUTION OF LAW SERIES, Vol. II). But no application seems to have been made of this by a rigid method of inductive demonstration in tracing the evolution of a specific idea or institution.

In the recent work of Pinélès, a Polish scholar and lecturer at Vienna, QUESTIONS DE DROIT ROMAIN; ETUDIEES D'APRES LA NOUVELLE METHODS HISTORIQUE DU DROIT COMPARE (translated by Herzen, Paris, 1911), some parade is made in the preface of the author's "New Method," which shall remedy the "defects" of the prior methods of that science; but the examples given as the professed demonstration of the new methods are lacking in any advance over the method of such eminent laborers as Maine and Post.

In Cogliolo's SAGGI SOPRA L'EVOLUZIONE DEL DIRITTO PRIVATO (Turin, 1885), this distinguished Romanist defines legal evolution in a well-balanced and truly scientific treatment, but then proceeds to his specific instances of the process of evolution with this singular postulate, fatal, of course, to the attainment of any results having great value. "Since it is not necessary to study all the plants of a certain species for purposes of botanical science, so it is not necessary for legal evolution to examine the laws of all peoples; to pile up facts and to repeat the accounts of others is not to discover principles; they may be discovered by

usual method and necessary effort has been to collect the materials for different countries and periods; for the tracing of the history in each country must come first. This has been possible hitherto for only a few systems of law, in their entirety; the European systems since the Christian era have been subjected to complex forces of imitation from each other, so that a pure system for any long period is rare. But the idea of evolution, as distinguished from history, has been seldom the objective of search. The method has been merely to search for common features in different legal systems, and after selecting here and there from the entire mass these common features, to point out the reappearance of common institutions, or in Del Vacchio's words "that certain ideas have been the common heritage of all humanity in all epochs." But this method proves only that similar forms have *existed* at different times and places. It does not *prove* that these forms have had any inherent or necessary *development* as ideas common to all, or that there is a necessary evolution for any particular idea in all times and communities.

Any rigidly scientific results must be based on at least the following elements: Taking a single idea or institution, its forms must be traced (1) in two or more successive epochs for the same communities; (2) then in two or more communities in successive epochs; (3) then the other legal institutions in the same communities and epochs must be mapped out, so that the connection if any may be disclosed; (4) then the main social forces in the same communities and epochs must also be mapped out, so as further to detect the possible causes of difference; (5) the whole must be conceived of as a simultaneous movement of forces. Perhaps such a rigid method is as yet impracticable, for lack of

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the study of a single system of law, provided it is like the Roman, not merely fragamentary and imperfect one, but brilliant in the completeness of its development;" and therefore he proceeds to demonstrate the existence of a number of supposed principles of evolution by Roman examples alone.

In Mazzarella's LES TYPES SOCIAUX ET LA DROIT (Paris, 1908; a compendium of his views scattered through various works), is found the only rigidly scientific system hitherto published. Its presentation is marred by certain favorite doctrines of his; but it is the one attempt at a genuinely complete method of generalization.

adequate data, but at least it is an ideal to be looked forward to.

Let us take an example of its possibilities.[3] Take two legal

[3] **Illustration of the Method of Studying Data of Legal Evolution.**

People Studied	Epoch.	A. Form of Law: a Case-Judgments; b Customs (b^1) Oral (b^2) Written; c Legislation	B. Organ of Law: a King; b Aristocracy or Oligarchy (b^1) ecclesiastic (b^2) political; c Democracy (c^1) lawyer-class (c^2) general assembly
Hebrews	B. C. 1200	a case-judgments	c^1 lawyer-class
	B. C. 900 B. C. 700	b^1 oral customs b^2 written customs	b^2 political oligarchy b^1 ecclesiastical oligarchy
	B. C. 400	c legislation	b^1 ecclesiastical oligarchy
	A. D. 300	a case-judgments	c^1 lawyer-class
	A. D. 500	a case-judgments	c^1 lawyer-class
Romans	B. C. 700	a case-judgments	a Kings
	B. C. 500 B, C. 400	b^1 oral customs b^2 written customs	b^1 ecclesiastical oligarchy b^2 political oligarchy
	B. C. 200	a case-judgments	c^1 lawyer-class
	A. D. 200–600	c legislation	a Kings
Scandinavians	A. D. 500	a case-judgments	c^1 lawyer-class
	A. D. 1100	b^1 oral customs b^2 written customs	c^1 lawyer-class c^2 general assembly
	A. D. 1200	c legislation	b^2 political oligarchy a Kings
Anglo-Normans	A. D. 1100	a case-judgments	a Kings
	A. D. 1500	a case-judgments	b^2 aristocratic lawyer-class
	A. D. 1800	c legislation	c^2 democratic general assembly

Note: The data for Hebrew law are based on Messrs. Kent and Sanders' chapters on The Growth of Israelitish Law in Yale University

ideas: first, that of the *form* of expression of law; secondly, that of the *organ* for declaring law. (A) The three chief *forms* of the expression of law are (a) statute or legislation, (b) custom, (c) judgments. Sir Henry Maine advanced the plausible assertion that the historical sequence is always the reverse of the above, i. e., is this: judgments, customs (first oral, then written), legislation. (B) The three main *organs* for declaring the law have been: (a) Kings, or chieftains, (b) Aristocracies, either ecclesiastical or political or military, (c) Democracies, either by an expert body of lawmen or lawyers, or by a popular assembly, representative or otherwise. Sir Henry Maine advances the conclusion that in the Indo-European communities, the order of development was as above: Kings, aristocracies, democracies; the Orient, in the second stage (aristocracy), developing by an ecclesiastical oligarchy, and the Occident by a military or political one.

(A) Let us now test these generalizations by tracing these institutions in three or four types of peoples in successive epochs: In tracing the first institution, the *form* of expression of law, we find that Sir Henry Maine's sequence does indeed appear in Roman development; though the sequence is broken between (b) and (c) by a marked reversion to (a), or case judgments, during the late republic and early empire. (Of course, it must be understood that in tracing the sequence of these elements, we emphasize only the *dominant* element; two or more elements may exist at the same time, especially case judgments and legislation; but one or the other is so dominant as to give the real character of the epoch; just as a river has many side eddies, though the main current is plain). Among the Hebrews, however, a reversal of Sir Henry Maine's sequence is found; for the flowering time of Hebrew law is found in the records of the Ghemara, the case law or casuistry of the rabbis in the 4th to 6th centuries A. D.; the rabbis were virtually a lawyer class voicing popular

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BIBLICAL AND SEMITIC STUDIES (1901). Those for Scandinavian law are based on Mr. Ebbe Hertzberg's chapter on Scandinavian sources in vol. I. ("General Survey") of the CONTINENTAL LEGAL HISTORY SERIES (1913). The data for Roman law are based on the manuals of Muirhead and others.

civic law. In the Scandinavian communities (ignoring local variances between the three main regions) we find probably the purest record of independent development in any recorded people; and here the sequence of Sir Henry Maine is found in its exactness; the peculiarity is that the second and third stages are so sharply compressed into a short period; whereas elsewhere the second period tended to be prolonged. But in the Anglo-Norman history, which is the most mixed of all in its influences, the second stage, customs oral and written, is virtually omitted (unless we distort the period of written and printed case law since A. D. 1400 by calling it customary law); and in the 1800's the method of legislation suddenly dominates the entire mass; perhaps the Crownwellian revolution, had it succeeded in its abortive legal changes, would have marked the destined time for a stage of codified custom; but at any rate it did not in fact.

And it is to be noted that Sir Henry Maine's generalizations might be interpreted as meant to explain the *whole* course of a people's legal development, from beginning to end. Yet the above illustrations represent only segments from a continuous legal life of at least two of the peoples; only the Romans and the Hebrews have ended their legal career. Hence, the complete legal life, if traced, might show even further variations from Sir Henry Maine's sequence.

(B) Taking next the second legal idea, viz., the *organ* for expression of law, we find that Rome does indeed exhibit Sir Henry Maine's sequence, viz., kings, oligarchies (ecclesiastical and political), democracies (lawyer class and general assmbly); and Sir Henry Maine's sequence was based partly on Rome as a type. But even here we find before the end of Roman organized life a marked reversion once more to the first stage, viz., imperial law; and this would signify either that Sir Henry Maine's typical sequence is imperfect, or else that the triple sequence is invariably followed by a renewed cycle of the same sequence; and yet in either case it is fallacious. Moreover, in Scandinavia, we find history emphatically exhibiting the exact reversal of Sir Henry Maine's sequence, viz., (c), (b), (a); while among the Hebrews his first stage, viz., (a) kings as judges, is not found at all. In the Anglo-Normans, his three stages are found in his exact se-

quence; and yet here the influences were the most mixed, and therefore the coincidence would seem to be less reliable as revealing an inherent type of development.

In short, a rigid inductive method leaves little degree of certainty to his generalized hypothesis.

Next, however, comes the necessary complement in this method, viz., the mapping out of the related legal institutions and of the social forces; so that the clues to the variations in the selected institutions may be discovered. Space does not suffice to expound the application of this part of the method.[4] It must suffice here to note that, taking these outlines, our task would be to prolong the chart, for each people and each epoch, by filling in the several facts (so far as ascertainable), and then to study to detect the possible connection between some of these facts and the variations in the selected institution. For example, both the Scandinavians and the Hebrews, at the period of our earliest knowledge, lack the element of kingly justice. With what feature of their social life is this lack connected? It could hardly be connected with the facts of clan and tribal organization; for both Scandinavians and Hebrews had this at that period; moreover the Anglo-Normans lacked it entirely, though they had a king as organ of justice. Was it connected with the conquistadorial relation of Romans and Anglo-Normans to a subject people largely outnumbering the conquering immigrants? This feature existed for both early Romans and early Anglo-Normans; but it was lacking in Scandinavia. And yet, must we not say that it was found among the Hebrews after the exodus?

[4] So far as ascertainable, only two authors have hitherto attempted any schematic tables of data mapped out on this line.

Mazzarella's tables (LES TYPES SOCIAUX ET LA DROIT) are virtually useless because based on his fundamental postulate of the distinction between feudal and "gentilician" societies as the controlling one; but his method is undoubtedly sound, and deserves the universal attention of scholars.

H. A. Junod's LIFE OF A SOUTH AFRICAN TRIBE (1912, 2 vols.) has in the appendix a schematic table representing the successive stages in social and economic conditions for a certain African tribe. So far as it goes, this is precisely the method to be used; but his data are too largely hypothetical.

And so, just as we approach some plausible explanatory factor, we find ourselves again baffled and doubtful.

Take again, the principal legal institutions, patriarchal power, blood-fend, adoption, serfdom, commercial exchange, and so on; do we find that any of these, or any combination of them, signifying some definite stage of legal development in themselves, are associated with some particular feature of the form of expression of law, e. g., case judgments? If in two or more communities we could discover such a connection, we might be entitled (hypothetically) to attribute that feature to a particular stage of legal development in general; and this hypothesis could then be tested for other communities, and their variations be explained by local factors.

For these problems I do not pretend to offer any solutions.[5] I point out merely, in conclusion, that the solutions will be reached only by the adoption of a rigidly scientific analysis of the data, and that any general truths hitherto discovered must be regarded merely as guiding hypotheses. And above all, I suggest that an evolution of law cannot be thought of except as a movement of cause and effect, i. e., that successive forms taken by hypothetically constant elements in each legal idea in time and place under all the forces of its environment.

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[5] I am inclined to think that the Italians will supply the scholar who will first offer acceptable solutions. There is scarcely one of their younger legal scientists who does not have something to say upon the evolution of law; and more thought is devoted to the subject in Italy than in all other countries put together.

Among some of the more recent chapters the following may be noted:

ARTURO MONASTERIO, L'ELEMENTO MORALE NELLE NORME GIURIDICHE, CONSIDERATO NELLA EVOLUTIONE STORICA, pt. II, ch. VI (Perugia, 1913).

SILORIO PEROZZI, PRECETTI C CONCETTI NELLA EVOLUZIONE GIURIDICA (Rome 1912).